

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34249

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| ADADE ADJEI-TWUM, |) | 2008 Unpublished Opinion No. 532 |
| |) | |
| Plaintiff-Appellant, |) | Filed: July 7, 2008 |
| |) | |
| v. |) | Stephen W. Kenyon, Clerk |
| |) | |
| RUSS GIBSON, d/b/a/ GIBSON HOMES, |) | THIS IS AN UNPUBLISHED |
| |) | OPINION AND SHALL NOT |
| Defendant-Respondent. |) | BE CITED AS AUTHORITY |
| |) | |

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Joel D. Horton, District Judge.

Order denying motion to modify arbitration decision, affirmed.

Adade Adjei-Twum, Meridian, pro se appellant.

Wyatt B. Johnson of Angstman, Johnson & Assoc., PLLC, Boise, for respondent.

PERRY, Judge

Adade Adjei-Twum appeals from the district court's order denying Adjei-Twum's motion to modify an arbitration decision. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Adjei-Twum entered into a contract with Russ Gibson, doing business as Gibson Homes, whereby Gibson would construct a home on Adjei-Twum's property. The contract consisted of several separate documents. The parties signed an agreement titled "RE-22 Pre-Sold New Construction" on February 21, 2005.¹ That document included a provision regarding attorney fees, which stated:

¹ The record on appeal does not contain all of the documents executed by the parties regarding construction of a home, but Adjei-Twum attached a copy of the document titled "RE-22 Pre-Sold New Construction" to his appellate brief. The contents of these documents are not in dispute on this appeal. Without deciding whether the agreement titled "RE-22 Pre-Sold New

28. ATTORNEY'S FEES: If either party initiates or defends any arbitration or legal action or proceedings, which are in any way connected with this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorneys' fees, including such costs and fees on appeal.

According to the district court, on that same date, the parties also executed a document titled "Gibson Homes Building Contract," which provided, in part:

IT IS HEREBY AGREED that any dispute arising hereunder, which cannot be mutually agreed to by the CONTRACTOR and OWNER, shall be settled by arbitration. The decision of such persons shall be binding by the parties on the agreement.

On January 10, 2006, Adjei-Twum filed a complaint against Gibson, alleging that Gibson failed to timely complete construction of the home and improperly installed lights at the home. The complaint requested \$7,200 in damages for an increase in the interest that Adjei-Twum incurred on a loan as a result of Gibson's delayed construction, \$3,664.76 in damages for additional construction loan interest, \$334 in damages for the cost of replacing the lights, and reasonable attorney fees and costs. The complaint alleged that the sum of reasonable attorney fees and costs would be \$5,000 if the matter was uncontested but would be more if Gibson contested the matter. Gibson filed an answer, which asserted, in part, that the matter was subject to the arbitration clause. The parties stipulated to arbitration, and the district court submitted the matter to an arbitrator.

On August 11, 2006, the parties executed an arbitration agreement, which included a provision regarding attorney fees.² That provision provided that "each party shall bear its own legal fees and costs which have been or will be incurred in this matter." The parties appeared before the arbitrator on August 15 and August 16. The arbitrator issued a decision finding in

Construction" is properly before us, we rely solely on the district court's characterization of the documents regarding the contract for factual background.

² The arbitration agreement is not included in the record on appeal. We therefore rely on the district court's characterization of the agreement for factual background.

favor of Adjei-Twum on January 3, 2007.³ The arbitrator awarded Adjei-Twum \$4,998.76 in total damages. The damages consisted of \$3,664.76 for construction loan interest, \$334 for replacement of light fixtures, \$900 for concrete correction, and \$100 for concrete staining. Apparently disregarding the attorney fee provision in the arbitration agreement, the arbitrator's decision awarded Adjei-Twum attorney fees and costs. The decision stated: "Based upon the testimony, the claims and the documents submitted, the arbitor [sic] finds that the plaintiff is entitled to recover from the defendant Gibson Homes the sum of \$1,750.00 for attorney fees, together with their costs." Additionally, the arbitrator stated the "parties will each pay one half of the arbitrator's fees."

On January 17, 2007, Adjei-Twum filed a motion in the district court requesting \$18,879 in attorney fees and \$2,035.17 in costs. Gibson filed a motion in opposition and requested attorney fees and costs pursuant to I.C. § 12-121. Adjei-Twum then filed a motion to modify or correct the arbitrator's award, relying on I.C. §§ 7-909 and 7-913(a)(1)-(3). Gibson again replied in opposition. After a hearing on the motions, the district court denied Adjei-Twum's request for additional attorney fees and costs on the ground that I.C. §§ 7-913(a)(1)-(3) did not provide a basis for any modification of the arbitrator's award. The district court also denied Gibson's request for attorney fees and costs incurred in opposition to Adjei-Twum's motions. Adjei-Twum appeals, challenging the arbitrator's award.

II.

ANALYSIS

A. Modification of Arbitrator's Decision

When reviewing a district court's decision to vacate or modify an award of an arbitrator this Court employs virtually the same standard of review as that of the district court when ruling on the petition. *Norton v. California Ins. Guar. Ass'n.*, 143 Idaho 922, 924, 155 P.3d 1161, 1163 (2007); *Moore v. Omnicare, Inc.*, 141 Idaho 809, 814, 118 P.3d 141, 146 (2005). Judicial review

³ Although Adjei-Twum's notice of appeal requested that the arbitrator's written decision be included in the record on appeal, the decision is not properly included in the record before us. However, Adjei-Twum included a copy of the decision as an exhibit attached to his appellate brief. We note that filing a motion to augment the appellate record, pursuant to I.A.R. 30, is the proper procedure to supplement the record with missing orders, decisions, or documents. Because Adjei-Twum requested the decision to be included in the record in his notice of appeal and its contents are not in dispute, we will consider the exhibit attached to his brief.

of an arbitrator's decision is strictly limited under the Uniform Arbitration Act (UAA), I.C. §§ 7-901-922. *Norton*, 143 Idaho at 924, 155 P.3d at 1163. Even if a reviewing court believes some of the arbitrator's rulings are erroneous, it must confirm the arbitrator's award unless it finds one of the enumerated grounds for relief set forth in I.C. §§ 7-912 or 7-913. I.C. § 7-911. *See also Am. Foreign Ins. Co. v. Reichert*, 140 Idaho 394, 398, 94 P.3d 699, 703 (2004). Limited judicial review of an arbitrator's decision is required to preclude a court from substituting its own judgment for that of the arbitrator. *Norton*, 143 Idaho at 924, 155 P.3d at 1163.

1. Arbitrator's award of attorney fees and costs

Adjei-Twum asserts that I.C. §§ 7-913(a)(1)-(3) required the district court to modify the arbitrator's award of attorney fees and costs. According to Adjei-Twum, he was entitled to modification because the arbitrator awarded attorney fees and costs before Adjei-Twum had an opportunity to provide the arbitrator with information regarding the amounts he incurred in the litigation leading up to the arbitration proceedings and during the arbitration proceedings.⁴

Idaho Code Section 7-913(a)(1) requires a court to modify or correct an arbitration award when there "was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award." The evident miscalculation of figures under I.C. § 7-913(a)(1) must be a mathematical error in calculating the amount of an award, not a legal error in the elements or measure of damages when making the award. *Cranney v. Mut. of Enumclaw Ins. Co.*, 145 Idaho 6, 9, 175 P.3d 168, 171 (2007).

Adjei-Twum asserts that the arbitrator's award contains an evident miscalculation or mistake because the actual amount of fees and costs incurred by Adjei-Twum was unknown to the arbitrator at the time the arbitrator awarded \$1,750. The district court relied on *Landmark v. Mader Agency, Inc.*, 126 Idaho 74, 76, 878 P.2d 773, 775 (1994), to rule that I.C. § 7-913(a)(1)

⁴ Adjei-Twum appears to cite I.C. § 7-910 as an additional basis for modification of the award. Adjei-Twum did not raise an argument under this section at the hearing below and the district court did not address this section as a basis to modify the award. Adjei-Twum's motions filed in the district court are not included in the record before us. It is the responsibility of the appellant, however, to provide a sufficient record to substantiate his or her claims on appeal. *Powell v. Sellers*, 130 Idaho 122, 127, 937 P.2d 434, 439 (Ct. App. 1997). In the absence of an adequate record on appeal to support the appellant's claims, we will not presume error. *Id.* Additionally, issues not raised below may not be considered for the first time on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). Thus, we will not address whether I.C. § 7-910 required the district court to modify the award when the record does not demonstrate that Adjei-Twum cited that section as a basis for modification below.

did not require modification because there was no miscalculation or mistake evident on the face of the arbitrator's decision. In *Landmark*, nothing in the original award was in any way inconsistent with any other aspect of that award, and the district court was unaware of any potential inaccuracy in the award until after it considered affidavits disputing the arbitrator's factual findings. The Supreme Court held the UAA does not provide for such review and the district court erred in modifying the award. *Id.*

In the present case, the district court noted that the award of \$1,750 for attorney fees and costs was approximately 35 percent of the underlying damages award of \$4,998.76. The district court ruled the 35 percent of the damages was an amount consistent with a typical contingency fee agreement. The award does not contain any evident miscalculations or mistakes demonstrating that the arbitrator erred regarding fees and costs incurred by Adjei-Twum. Accordingly, the district court properly concluded that the arbitrator's award did not contain an evident miscalculation or mistake, and modification of the award was not authorized under I.C. § 7-913(a)(1).

Idaho Code Section 7-913(a)(2) provides that a reviewing court shall modify an arbitration award where the arbitrators have "awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted." An arbitrator's authority is derived from the parties' arbitration agreement. *Norton*, 143 Idaho at 925, 155 P.3d at 1164; *Hecla Mining Co. v. Bunker Hill Co.*, 101 Idaho 557, 564, 617 P.2d 861, 868 (1980). An arbitrator exceeds its authority and jurisdiction when it rules on an issue not submitted by the parties. *Norton*, 143 Idaho at 925, 155 P.3d at 1164.

Adjei-Twum asserts that this section required modification because the arbitrator issued the award of attorney fees and costs before Adjei-Twum submitted a motion setting forth the amounts incurred. The district court correctly noted, however, that the arbitrator's decision indicates that the award of attorney fees was based on the testimony, claims, and documents submitted. The arbitrator also apparently disregarded--to Adjei-Twum's benefit--the clause of the arbitration agreement requiring the parties to pay their own fees and costs and, instead, relied on the provision of the construction agreement titled "RE-22 Pre-Sold New Construction," which entitled the prevailing party to attorney fees and costs. Additionally, Adjei-Twum's complaint--which was presumably available to the arbitrator--contained an allegation that Adjei-Twum's attorney fees would be \$5,000 if Gibson did not contest the complaint. Adjei-Twum has not

directed us to any agreement or order requiring the arbitrator to accept Adjei-Twum's written motion regarding attorney fees and costs prior to awarding attorney fees and costs. The district court properly ruled that the issue of attorney fees and costs was submitted to the arbitrator, and I.C. § 7-913(a)(2) did not require modification.

Idaho Code Section 7-913(a)(3) requires a court to modify an arbitration award when the "award is imperfect in a matter of form, not affecting the merits of the controversy." Although Adjei-Twum relied on this section as a basis for modification of the award below and cites the section on appeal, he has not demonstrated how the arbitrator's award of attorney fees and costs was imperfect in a matter of form. Rather, his arguments on appeal focus on the lack of information regarding fees and costs available to the arbitrator at the time it issued its decision. Thus, we conclude that Adjei-Twum has failed to demonstrate that the district court erred in rejecting I.C. § 7-913(a)(3) as a basis for modification of the award.

2. Arbitrator's damages award

In Adjei-Twum's appellate brief, he also asserts that the arbitrator deprived him of \$7,200 in damages by miscalculating the "end loan interest rate" losses incurred by Adjei-Twum. Based on the district court's decision from which Adjei-Twum appeals, however, the issue of attorney fees and costs was the only issue that Adjei-Twum presented to the district court. Indeed, the transcript from the hearing in the district court indicates that counsel for Adjei-Twum waived all issues related to damages. Counsel stated Adjei-Twum was only challenging the arbitrator's award of attorney fees and costs and was "not asking the court to tinker with his arbitration award when it came to damages." Generally, issues not raised below may not be considered for the first time on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). Because Adjei-Twum did not challenge the arbitrator's award of damages below, we will not address it on appeal.

B. Adjei-Twum's Request for Attorney Fees and Costs in the District Court

Adjei-Twum appears to assert that he is entitled to attorney fees and costs incurred during the modification proceedings before the district court. Pursuant to I.C. § 7-914, attorney fees and costs incurred during modification proceedings may be awarded by the district court. *See Driver v. SI Corp.*, 139 Idaho 423, 429, 80 P.3d 1024, 1030 (2003). The record before us does not contain Adjei-Twum's motions filed during the modification proceedings and, at the hearing on those motions, Adjei-Twum did not assert that he was entitled to attorney fees and costs incurred

during the modification proceedings. Thus, Adjei-Twum may not now assert that the district court erred by failing to award attorney fees and costs incurred during the modification proceedings when the record does not indicate that he made such a request below. *See Barbee v. WMA Sec., Inc.*, 143 Idaho 391, 397, 146 P.3d 657, 663 (2006). Furthermore, even if we assume that Adjei-Twum preserved his request in the motions not included in the record before us, Adjei-Twum did not prevail in the modification proceedings. Because Adjei-Twum was not the prevailing party at the modification hearing in the district court, he was not entitled to fees and costs. *See Norton*, 143 Idaho at 926, 155 P.3d at 1165.

C. Attorney Fees and Costs on Appeal

Adjei-Twum has not prevailed in this appeal and is appearing as a pro se litigant. For both of these reasons, he is not entitled to attorney fees incurred in this appeal. *See Barbee*, 143 Idaho at 397, 146 P.3d at 663.

Gibson requests attorney fees pursuant to I.C. § 12-121, I.A.R. 41, and the construction agreement.⁵ An award of attorney fees may be granted under I.C. § 12-121 and I.A.R. 41 to the prevailing party and such an award is appropriate when the court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation. *Rendon v. Paskett*, 126 Idaho 944, 945, 894 P.2d 775, 776 (Ct. App. 1995).

Gibson asserts that this case is similar to *Mumford v. Miller*, 143 Idaho 99, 137 P.3d 1021 (2006). In that case, Mumford challenged an arbitrator's decision not to award attorney fees after Mumford received damages in arbitration, even though the underlying contract provided for attorney fees to the prevailing party. The Supreme Court held that Mumford's arguments amounted to a disagreement with the arbitrator's factual findings and legal conclusions. *Mumford*, 143 Idaho at 101, 137 P.3d at 1023. The Court noted that its precedents clearly and repeatedly hold that the grounds upon which a court may review an arbitrator's decision are narrow and specifically delineated, and complaints about factual and legal rulings are not among them. The Court then held that, because the law was well settled, the respondents were entitled to attorney fees under I.C. § 12-121. *Id.* at 101, 137 P.3d at 1023.

⁵ Gibson has not challenged the district court's denial of his request for attorney fees and costs incurring during the modification proceedings in the district court.

We however conclude that Adjei-Twum has raised a nonfrivolous issue in regard to the arbitrator's award of attorney fees prior to receiving the documentation to support the award. We therefore decline to award attorney fees incurred in defending this appeal to Gibson pursuant to I.C. § 12-121 and I.A.R. 41. We also decline to award attorney fees pursuant to the construction agreement as Gibson did not prevail in the dispute regarding that agreement before the arbitrator.

III. CONCLUSION

The district court properly concluded that modification of the arbitrator's award of attorney fees and costs was not authorized under I.C. §§ 7-913(a)(1)-(3). Adjei-Twum did not preserve for appeal a challenge to the arbitrator's award of damages. Adjei-Twum was not entitled to attorney fees and costs incurred during the modification proceedings in the district court. We therefore affirm the district court's order denying Adjei-Twum's request to modify an arbitration decision. Gibson is awarded costs, but not attorney fees, on appeal.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**